**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | CC Docket 94-102 |
| Wireless E911 Phase I Implementation Issues | ) | |
| | ) | |
| King County Request | ) | (DA 00-1875) |

JOINT OPPOSITION OF NENA, APCO AND NASNA
AS PUBLIC SAFETY COMMUNICATORS

The National Emergency Number Association ("NENA"), the Association of Public-Safety Communications Officials-International, Inc. ("APCO") and the National Association of State Nine One One Administrators ("NASNA"), hereafter "Public Safety Communicators," strongly oppose the petition of wireless carriers Verizon, Qwest, VoiceStream and Nextel ("Petitioners") for reconsideration of the letter order ("Order") of the Wireless Telecommunications Bureau.[1] We ask that the Bureau exercise its discretion under Section 1.429(a) to refer the petition to the full Commission for action.

Petitioners' opening concern is that the Order did not expressly address many of their arguments. For that matter, the same could be said for many of the arguments of the Public Safety Communicators. The contentions of both sides are fairly summarized in the paragraph captioned "Comments" at the top of page 3. Legally, of course, the Commission need not



[1] Letter of Thomas J. Sugrue to Marlys R. Davis, E911 Program Manager, King County, Washington, dated May 7, 2001 and stamped as filed with the FCC Secretary May 25, 2001. A pleading cycle for the reconsideration petition was established by Public Notice, DA 01-1520, June 27, 2001.

address, explicitly and by attribution, each point made by every commenter.[2] Under the arbitrary and capricious standard of the Administrative Procedure Act applied to informal adjudication, 5 U.S.C.§706(2), an agency decision will survive judicial scrutiny unless it is utterly unexplained or implausible[3] The Order plausibly explained the decision. To the extent the Commission wishes to augment its reasoning, it may do so in the order on reconsideration. The order should deny the petition, as explained below.[4]

## I. The Order Did Not Improperly Redefine the E9-1-1 Network.

Petitioners (at 6) fault the Order for changing the definition of the E9-1-1 network. This did not happen. Inviting public comment on the King County request, the Commission said:

> For purposes of this Public Notice, we consider the E911 network to include all facilities and equipment beyond the wireless carrier's switch necessary to transmit wireless 911 calls to PSAPs.[5]

Contrary to Petitioners' assertions, that premise is not inconsistent with the determination in the Order that:

> The E911 *Wireline* Network thus consists of: the 911 Selective Router; the trunk line between the Selective

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[2] The "brief statement" required in support of an informal adjudication pursuant to the Administrative Procedure Act, 5 U.S.C.§555(e), expressly applicable only when an agency denies a written request, need only "provide an explanation that will enable [a] court to evaluate the agency's rationale at the time of decision." *PBGC v. LTV Corp.*, 110 S.Ct. 2668, 2680 (1990).

[3] *Lewis v. Lujan*, 826 F.Supp. 1302 (D.Wyo. 1992), *aff'd* 998 F.2d 880.

[4] Because we believe the Order properly interprets the rules and does not change them, we need not engage in extended discussion of Petitioners' claims (Petition, 5) that the King County request is an untimely petition for reconsideration of rules or an impermissible collateral attack on those regulations. For the same reason, notice and comment rulemaking was not required. If the Order exceeds the Bureau's delegated authority – which we doubt – the Commission can resolve the problem by deciding the Petition itself.

[5] DA 00-1875, August 16, 2000, note 3.

> Router and the PSAP; the ALI database; and the trunk line between the ALI database and the PSAP.

(Order, 4, emphasis added) Petitioners assume this description errs by omitting the "trunks from the MSC and/or LEC end office to the 911 selective router," which they assert are "provisioned for the PSAP's benefit and for which the PSAP bears the costs." (Petition, 6)

The Commission is entitled, if it chooses, to define a core "E911 Wireline Network" to which all carriers connect their respective subscribers. These carriers include not only LECs and wireless carriers but also Competitive LECs ("CLECs"). The fact that all three connect their end offices or mobile switches to the Selective Router by means of wire lines does not logically require that those trunk lines be part of the core E911 Wireline Network. Instead, it is perfectly permissible to treat the connections as part of a larger "E911 network," which is what the Commission has done.[6]

## II. The Commission Has Interpreted a Rule, Not Created a New One.

The Commission correctly understood that King County asked for an assignment of cost responsibility between wireless carriers and PSAPs within the larger E9-1-1 network. (Order, 7) The Commission correctly understood that King County, which had asked for Phase I service and been denied it by some wireless carriers, needed to know the meaning of Section 20.18(j) so that the County could be "capable of receiving and utilizing the data elements associated with the

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[6] The advantage of this labeling is that it avoids confusion with the separate question of who pays for the connecting trunks, which is disputed only as between wireless carriers and PSAPs. For example, incumbent LECs ("ILECs") historically have been paid for trunks connecting their end offices to Selective Routers, while CLECs have not. This difference is not at issue here, although Petitioners have sought to inject it through claims of discrimination. As discussed *infra*, wireless carriers are treated the same as CLECs, and any disparities with ILECs are reasonable.

service." (Order, 2)[7] That is, exactly which costs of conversion to readiness for wireless E9-1-1 must the PSAP demonstrate that it is prepared to meet?

Conversely, as required by the revision of the cost recovery rules, which costs of delivery of wireless E9-1-1 service, in a form that PSAPs could receive and utilize, are to be met by wireless carriers? *Id.*, citing to *E911 Second Memorandum Opinion and Order*, 14 FCC Rcd 20850, 20866-67 (1999). Among numerous difficulties with Petitioners' own interpretation of the new cost recovery rules are the following:

- Carried to its logical conclusion, the claim that all costs beyond the MSC are to be met by the PSAP means that none is the responsibility of the wireless carrier and the cost recovery revisions of 1999 are essentially nullified.

- But we know this cannot be so because the record is replete with carrier acknowledgment, prior to the rule change in 1999, that they expected to be reimbursed for the very upgrade expenses Petitioners now attempt to disown.[8]

The Order answered the first question posed in the Public Notice calling for comment on the King County petition: "Whether a clear demarcation point exists in the E911 network that distinguishes between carriers' and PSAPs' responsibilities for E911 Phase I implementation." Notice that the point was thought to lie "in the E911 network." Effectively, Petitioners argue that no such point exists because their cost responsibility ceases at the border (the MSC) where

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[7] That the phrase is ambivalent is demonstrated by the record in the petition for declaratory ruling brought by the City of Richardson, as to which the Commission recently sought a second round of comments and replies. Public Notice, 01-1623, July 10. 2001.

[8] Joint Comments of Public Safety Communicators, September 18, 2000, 9-11. *See also*, Joint Reply Comments of Public Safety Communicators, October 11, 2000, 2, citing the acceptance by SBC and Nextel of their responsibility to pay costs up to the Selective Router. In fact, given its earlier statements, Nextel's role as Petitioner here appears to be an unexplained reversal of position. After the close of comments on the King County petition, AT&T Wireless also joined SBC and Nextel in acknowledging the propriety of the cost allocations later effectuated in the Order. Letter of March 16, 2001, to WTB Chief Thomas Sugrue.

the E911 network begins. The Commission disagreed and found a demarcation point that is consistent with the revised cost recovery order and filled a silence in the wireless E9-1-1 rules. The Order does not change any rule.

## III. Wireless Carrier Ability to Raise Rates to Recover E9-1-1 Costs is Relevant.

Petitioners assert that the wireless carrier option of recovering Phase I upgrade costs through increased charges to customers "is irrelevant for purposes of the Commission's rules and is without support in the record." To the contrary, this is the nub of the matter. As the Order states (2, and note 2), the King County petition "derives, in part" from the revised cost recovery order of 1999, which "found that since wireless carrier rates are unregulated, there was no need for a government-mandated carrier cost recovery mechanism." Without the 1999 change in cost recovery, there would have been no King County petition.

As noted above, it is Petitioners (Nextel apparently having changed its mind)[9] who make the unsupportable claim that costs they once expected to be reimbursed for are no longer their responsibility if not reimbursed.

We see no need for the Commission to have responded to Petitioners "cost causation" argument (Petition, 10), which is more suited to a tariff environment not imposed on wireless services. In any event, Petitioners admit (note 36) that the issue is a policy choice on which the agency has broad latitude.[10]

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[9] Note 8, *supra.*

[10] Moreover, "PSAPs are not the cost causers for wireless E911 implementation." *U.S. Cellular Corp. v. FCC*, No. 00-1072 (DC Cir June 29, 2001), Section II, fourth paragraph.

## IV. The Order Does not Grant the PSAP "Full Authority to Determine the Technology."

We are simply baffled by this assertion (Petition, 11) which is directly contradicted at two places in the Order. At note 2, the Commission gives early warning that it will not interpret the King County request as "concerning which party has authority to select the particular Phase I implementing technology." Later, the Order (at 7) repeats:

> We do not address the issue of which party – PSAP or carrier – may choose the transmission method and technology to be used to provide Phase I.

If the parties cannot agree on a choice, the Order proposes to resolve the dispute by examining, among other factors, the "additional costs" to both parties in one option or another. The clear implication, as in the revised cost recovery order, is that the party who pays may have a strong argument for asserting the right to choose. Arguably, wireless carrier cost responsibility may obtain something of value for the carrier.

## V. The Order Does not Discriminate Unreasonably.

NENA demonstrated on the record of this proceeding the heavy and unpredictable burdens that would be imposed on 9-1-1 Authorities if forced to pay for distance-sensitive trunk connections from far-flung wireless MSCs and CLEC switches whose locations PSAPs can neither dictate nor control. NENA also suggested that the number of trunk connections these competitive carriers must make to Selective Routers is minuscule compared with the vastly greater array of links that must connect to the Public Switched Telephone Network for conventional commercial purposes of local and long-distance calling service.[11]

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[11] Letter of February 2, 2001, to FCC Secretary from James R. Hobson, Counsel for NENA.

Plainly, wireless carriers are not treated unfairly by comparison with CLECs. The latter pay for their own connections from end offices to Selective Routers. The Order merely calls for wireless carriers to do the same. The different treatment of ILECs is one more historical artifact which could not be overcome by the stroke of the President's pen when P.L. 104-104 was signed in February of 1996.[12] Given that the conventional spacing between an ILEC end office and a Selective Router is shorter and more predictable, there is an element of reasonableness in differentiating between ILEC-PSAP relationships and wireless carrier/PSAP or CLEC/PSAP relationships.

It may be that the new paradigm of competition requires a change in ILEC expectations. It may be that ILECs, just as wireless carriers and CLECs, should "pay their way in" to Selective Routers instead of being paid by PSAPs for those connections.[13] The Public Safety Communicators would not object to a rulemaking aimed at this issue. But the Order was not the place for that discussion and deserves to be upheld on its own terms as reasonably non-discriminatory.

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[12] Where state law and historic practice favor an ILEC, courts generally have refused to treat this as unreasonable discrimination. *See, e.g. TCG v. City of Dearborn*, 206 F.3d 618 (2000), where a right-of-way fee on a CLEC was upheld despite Ameritech's immunity from the charge.

[13] ILECs could be expected to argue to state regulatory commissions that their end office-to-selective router costs still must be recovered in some fashion, for so long as the ILECs are rate-regulated carriers of last resort, but different jurisdictions might reach different solutions.

## CONCLUSION

For the reasons discussed above, the petition for reconsideration should be referred to the full Commission and denied.

Respectfully submitted,

PUBLIC SAFETY COMMUNICATORS

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